No. 79-1903

In the Supreme Court of the United States

OCTOBER TERM, 1979

BEVERLY L. BEELER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the original indictment against him was multiplicitous and that under the Double Jeopardy Clause his retrial on a superseding indictment realleging charges upon which the jury at his first trial had been unable to reach a verdict was barred by his acquittal at that trial on other charges.

After a jury trial in United States District Court for the Eastern District of Kentucky, petitioner, a former official of the Department of Housing and Urban Development (HUD), was convicted of obstructing commerce by extortion, in violation of 18 U.S.C. 1951, and of soliciting and accepting a bribe given to influence the performance of an official act, in violation of 18 U.S.C. 201(c)(1). He was sentenced to concurrent terms of 18 months'

imprisonment on each count. The court of appeals affirmed by judgment order (Pet. App. 13-15).

1. Petitioner was initially charged in a 13-count indictment with one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371; one count of extortion, in violation of 18 U.S.C. 1951; and 11 counts of accepting bribes, in violation of 18 U.S.C. 201(c)(1). At his first trial, the district court granted petitioner's motion for a judgment of acquittal on one of the bribery counts, and the jury acquitted him on nine other bribery counts and on the conspiracy count. The jury was unable to reach a verdict on the one remaining bribery count and on the extortion count, however, and the court declared a mistrial as to those counts.

Subsequently, petitioner was charged in a superseding indictment with one count of extortion and one count of bribery; the extortion and bribery charges in the superseding indictment were identical to the charges on which the jury had been unable to reach a verdict at the first trial. In addition, the superseding indictment charged petitioner with one count of unauthorized solicitation and acceptance of property because of an official act, in violation of 18 U.S.C. 201(g) (a lesser included offense of the Section 201(c)(1) bribery). At the second trial, petitioner was convicted on the extortion and bribery counts.

The evidence showed that petitioner was a maintenance analyst in the Housing Management Division of HUD, whose duties included evaluating the money and material needs of a modernization program for the Newport, Kentucky, Housing Authority (A. 91a-99a).[1] In that capacity, he suggested to the housing authority director

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[1]"A." refers to the appendix in the court of appeals.

that federal grants would be forthcoming if the authority purchased building materials and automobile tires for petitioner's personal use (A. 115a-164a). The 11 bribery counts in the original indictment reflected different items that petitioner allegedly received as a result of this solicitation. Five of these bribes were also alleged as separate overt acts in the conspiracy count. Two other overt acts alleged the receipt of materials comprising the remaining bribes (see A. 10a-19a).

2. Petitioner contends that the first indictment was multiplicitous because, in his view, it charged essentially the same offenses three times—in the conspiracy count, the extortion count, and the eleven bribery counts. He further contends that his acquittal on the conspiracy count at the first trial barred, on double jeopardy grounds, his retrial on the extortion charge and on the one remaining count of bribery. These contentions are without merit.

a. The initial indictment was not multiplicitous because its various counts did not allege the "same offense." It is settled that a defendant may be charged, convicted and punished separately for violations of different statutes, even where these violations arise out of the same transaction and notwithstanding a substantial overlap in the proof offered to establish the crimes, so long as each statute "requires proof of a fact that the other does not." *Brown* v. *Ohio*, 432 U.S. 161, 166 (1977); *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975); *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). Here, the bribery charge required proof that petitioner solicited and accepted property to influence the performance by him of an official act. The extortion charge required proof that, under color of official right, petitioner affected interstate commerce by inducing the housing authority to part with property. Neither the bribery nor the extortion charge

required proof of an agreement. The conspiracy charge required proof that petitioner and another person agreed to defraud the United States, but did not require proof that petitioner accepted property or affected commerce. Because each offense thus required proof of acts that the others did not, petitioner was not placed twice in jeopardy for the same offense when he was retried for bribery and extortion following his acquittal for conspiracy.[2]

b. There is similarly no merit to petitioner's claim that the retrial on the extortion and bribery charges was barred under principles of collateral estoppel. This Court established in *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970),

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[2]Petitioner's reliance (Pet. 9) on *United States* v. *Austin*, 529 F.2d 559 (6th Cir. 1976), is misplaced. In *Austin*, the court held that a defendant may not be separately convicted and punished for conspiracy to commit bribery and a substantive bribery offense, where the conspiracy and substantive count were based on the same transaction. Although the holding in *Austin* is seemingly inconsistent with numerous decisions of this Court, we note that the Sixth Circuit subsequently limited *Austin* to the unique situation in which "the indictment was drawn in such a way that the substantive offenses 'in effect charged the same agreement or concert of action* * *' involving the defendant and other persons as was charged in the conspiracy count." *United States* v. *Fife*, 573 F.2d 369, 372-373 (1976). To the extent that the result in this case is inconsistent with the decision in *Austin*, that inconsistency is solely a matter for the court of appeals to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

In any event, even if petitioner is correct in asserting that the initial indictment was multiplicitous, it would not follow that the acquittal on the conspiracy count would bar retrial on the bribery and extortion charges. The jury's failure to acquit petitioner of extortion and one count of bribery, while acquitting petitioner of conspiracy and on the remaining bribery counts, reflects that at least some jurors believed that there was sufficient evidence of extortion and of one of the bribery charges. Accordingly, if the latter charges had been submitted to the jury together with the conspiracy charge in a single count, the jury would not have acquitted petitioner, but would have been unable to reach a verdict on that count, and petitioner would still have been subject to retrial on that count.

that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." This principle has no application here. Contrary to petitioner's assertion (Pet. 8), the jury's verdict of acquittal on the conspiracy count at the first trial did not determine that petitioner had not solicited and obtained bribes or committed extortion in his dealings with the housing authority director. The jury, for example, could have decided that, while petitioner obtained the property illegally, there was no conspiracy because the only co-conspirator suggested by the evidence—the authority's director—was an unwilling victim of petitioner's extortionate scheme and consequently could not be considered a co-conspirator. Given the other possible grounds for petitioner's acquittal on the conspiracy count, that acquittal cannot be deemed a final determination of an ultimate fact barring petitioner's subsequent conviction on different charges requiring different proof. Indeed, the fact that the same jury that acquitted petitioner of conspiracy was unable to reach a verdict on the extortion and on one of the bribery charges demonstrates that the jury did not determine the facts relating to the latter charges favorably to petitioner.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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